Supreme Court, U.S.
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No. 01-0981

In The

Supreme Court of the United States

WARD S. LARKIN,

Petitioner,

v.

COMPUSA, INC. & MICHAEL JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Judicial District Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Should this Court grant certiorari, either for jurisdictional or prudential reasons, where the Petitioner fails to plead or assert Federal claims in the Texas courts, fails to raise a Federal claim as a bar to the application by the Texas courts of an affirmative defense to the Petitioner's State claims, and fails to properly raise, argue, and brief a Federal claim pursuant to State procedural law?

Should this Court grant certiorari, where only Texas common law claims were raised by the Petitioner, where the Texas courts disposed of the State claims based on Texas common law immunity and where the Texas courts never addressed the Federal claim allegedly raised by the Petitioner?

LIST OF PARTIES

PETITIONERS:

Ward S. Larkin

RESPONDENTS:

CompUSA, Inc.
Michael Johnson

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CITATION OF LOWER COURT OPINION

Larkin v. Johnson, 44 S.W.3d 188 (Tex. App. – Houston [14th Dist.] 2001, pet. denied) (attached at Petitioner's Appendix, pp. 1-5).

STATEMENT OF THE CASE

Petitioner, Ward S. Larkin, filed suit against Respondents, CompUSA, Inc. and Michael Johnson, on June 10, 1997 wherein he alleged Texas common law causes of action for false arrest, false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress. *CR 3.*[1]

Respondent Johnson ("Deputy Johnson") generally agrees that Petitioner's restatement of the facts of the case in his "Statement of the Case" are accurate. However, some discrepancies in Petitioner's restatement are worth noting. Petitioner declares that "the charges against Larkin were dismissed for insufficient evidence." *Petition for Writ of Certiorari* at 5 (*"Petition"*). Deputy Johnson objected to this statement in the court of appeals as it was not supported by the record. *Appellee Johnson's Brief* at 6 n.7. Deputy Johnson maintains his objection.

Petitioner admitted that the volume of the statements directed at Deputy Johnson were "louder than conversational." *CR 214.* Deputy Johnson described Mr. Larkin's statements as "loud and abrupt." *CR 74.* Counting customers and employees, approximately twenty people

[1] For purposes of clarity, the Clerk's Record will be referred to as "CR."

were present during this incident. *Id.* Deputy Johnson was sure that the other people in the store overheard Petitioner. *CR 74.* Deputy Johnson observed that Petitioner was acting in an "irrational" and "alarming manner." *CR 152.* Deputy Johnson also observed that "several customers and employees in the area . . . appeared to be equally alarmed and confused" as was Deputy Johnson. *Id.* Based on Petitioner's actions, the language used, and the reaction of the people witnessing the incident, Deputy Johnson then decided to detain Mr. Larkin for disorderly conduct.[2] *CR 89, 91 & 153.* After Petitioner refused to submit to Deputy Johnson's detention, Deputy Johnson called the intake or screening attorney at the office of the Harris County District Attorney wherein charges for evading detention were accepted,[3] *CR 113.*

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[2] In pertinent part, "Disorderly Conduct" is as follows in Texas law:

> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;

TEX. PEN. CODE ANN. § 42.01(a)(1) (Vernon 1994).

[3] While it is not clear from the record whether Mr. Larkin was charged with a Class B misdemeanor or a Class A misdemeanor under the "Evading Arrest or Detention" statute, the underlying offense is as follows:

> A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him.

TEX. PEN. CODE ANN. § 38.04(a) (Vernon 1994).

Deputy Johnson also disputes Petitioner's repeated assertions throughout his Petition for Writ of Certiorari that he raised a Federal claim under the freedom of speech clause of the First Amendment before the Texas appellate courts. *See Petition* at 5-7. It is apparent that no Federal claim was properly raised when Petitioner's statements are read in context.

As noted above, Petitioner's claims were all tort claims under Texas common law. *See CR 3.* Deputy Johnson moved for summary judgment under the doctrine of official immunity, a State law affirmative defense.[4] *CR 14-154.* Petitioner first asserts that he "raised the federal question of Freedom of Speech under the Fighting Words Doctrine" in his response to Deputy Johnson's motion for summary judgment. *Petition* at 5. In fact, the quoted discussion comes from Petitioner's response to CompUSA's motion for summary judgment wherein Petitioner argued that a material issue of fact existed as to whether CompUSA could be liable under a respondeat superior theory for the acts of Deputy Johnson. *See CR 222-224.* Petitioner's argument was that Petitioner could not have committed the crime of Disorderly Conduct which meant that Deputy Johnson was enforcing "house rules" as opposed to State law when he attempted to detain and eventually arrested Petitioner. *Id.* Therefore, CompUSA could be held liable for the acts of its ostensible agent, Deputy Johnson. *Id.* In the portion of Petitioner's response which addressed Deputy Johnson's motion for

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[4] The elements of this doctrine, as well as some explanation of its application in Texas, are detailed below.

summary judgment, Petitioner did not raise or discuss any Federal claims.[5] *See CR 224-228.*

The trial court granted Deputy Johnson's motion for summary judgment on the only ground asserted by Deputy Johnson, official immunity. *CR 272.* Petitioner moved for a new trial wherein he reiterated verbatim the same paragraph already cited, *see Petition* at 5, and stated that Texas courts have held that the disorderly conduct statute only proscribes "fighting words." *Petition* at 6 (citing *CR 262-263*). Again, these assertions, assuming they sufficiently raised a Federal claim, were expressly raised in response to the trial court's granting of CompUSA's summary judgment and to support his argument that a new trial was proper because "[t]he determinative, unresolved fact issue is whether Plaintiff's arrest arose out of Johnson performing a duty assigned to him by CompUSA." *CR 261.* With regard to Deputy Johnson, Petitioner merely

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[5] Petitioner also asserts that he raised a Federal issue when he stated in his response, "[w]hether Plaintiff committed the crime of disorderly conduct or was exercising his right to Free Speech is a fact question in dispute." *Petition* at 5-6 (citing *CR 228*). However, this statement was merely a restatement in the "Conclusion" of his response that material fact issues precluded the trial court from holding that CompUSA could not be liable under a theory of respondeat superior for the alleged torts of Deputy Johnson. With regard to Deputy Johnson's motion for summary judgment based on official immunity, Petitioner concluded: "Deputy Johnson is not entitled to summary judgment because there is a dispute of material fact as to whether he was acting within the scope and course of his duties as a law enforcement officer and whether he was acting in good faith." *CR 228-229.* Good faith and scope of authority are two of the three official immunity elements.

argued that material issues of fact precluded the establishment of official immunity by Deputy Johnson. *See CR 266-269.*

Petitioner then appealed to the Fourteenth Court of Appeals in Houston, Texas. Here, he submitted a brief that copied verbatim his response to the Respondents' motions for summary judgment. *Compare CR 220-229 with Appellant's Brief at 2-9.* He again referred to "the same Fighting Words Doctrine argument," *Petition* at 6, in support of his argument that CompUSA could be liable under a respondeat superior basis and that material issues of fact precluded granting CompUSA summary judgment on this issue. *Appellant's Brief* at 2-5. He again asserted that material issues of fact precluded Deputy Johnson's official immunity defense at the summary judgment stage. *Appellant's Brief* at 5-8. Petitioner neither raised a new Federal claim, argued the trial court errantly denied a Federal claim, nor asserted that Federal law barred Deputy Johnson's assertion of official immunity. The opinion of the court of appeals neither referred to nor addressed any Federal claims. *See Larkin v. Johnson,* 44 S.W.3d 188 (Tex. App. – Houston [14th Dist.] 2001, pet. denied) (attached at Petitioner's Appendix, pp. 1-5). The opinion affirmed that Deputy Johnson was entitled to official immunity. *Larkin,* 44 S.W.3d at 190.

Petitioner filed a motion for rehearing before the Fourteenth Court of Appeals wherein he argued that the court failed to "properly measure [Petitioner's] conduct against the accepted standard objective reasonableness" of two cases of this Court. *Court of Appeals Motion for Rehearing* at 6. However, this passage was contained in an argument that the court of appeals misconstrued the

good faith element of the official immunity doctrine, *id.* at 4-6, an element which is measured against a test of "objective legal reasonableness." *Larkin*, 44 S.W.3d at 190. In substance, the Petitioner was merely criticizing the manner in which the State courts formulated and applied an element of a State law defense, the good faith element of the official immunity defense.

In his petition for review to the Texas Supreme Court, Petitioner asserted that the Texas Disorderly Conduct statute had been construed by Texas courts as applying only to "fighting words." *Petition* at 7-8 (quoting *Petition for Review* at 7). This assertion was in support of Petitioner's argument that he did not, in fact, commit a violation of the Disorderly Conduct statute. *Petition for Review* at 7-8. Even assuming Petitioner's assertion was correct, he again failed to raise an independent Federal claim, assert that a lower court had errantly failed to address an independent Federal claim, or to allege that a Federal claim barred Deputy Johnson's use of the Texas official immunity defense.

Petitioner's motion for rehearing from the denial of his petition for review by the Texas Supreme Court asserted that the Texas Supreme Court erred by not issuing a full, written opinion addressing all of Petitioner's issues, that the court of appeals violated the Texas Constitution's separation of powers provisions, that the Texas Supreme Court was biased against Petitioner, and that Deputy Johnson's summary affidavits were insufficient. *Texas Supreme Court Motion for Rehearing* at 3. Again, no Federal claims were raised, argued or briefed before the Texas Supreme Court.

REASONS FOR DENYING THE WRIT

The Court should deny the Petition for Writ of Certiorari for several reasons. First, Petitioner's Federal constitutional claim[6] was never pleaded, it was never raised, argued or briefed in any document or brief filed with any Texas court, and it was never raised as a bar to Deputy Johnson's assertion of Texas official immunity. Petitioner's failure to preserve his Federal claim counsels against the Court granting a writ of certiorari. Second, Petitioner only pleaded claims under the Texas common law. This Court should not take jurisdiction over this case where Petitioner's State claims were dismissed under a State immunity doctrine and, even assuming Petitioner properly raised his Federal claim before the Texas courts, the Texas courts failed to address Petitioner's Federal claim.

A. The Court Should Deny the Petition Because Petitioner's Federal Claim was Never Preserved in the Texas Courts

The Court should decline to accept jurisdiction over this case because Petitioner utterly failed to preserve the

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[6] Although not clear, Petitioner's Federal claim appears to be based on the free speech clause of the First Amendment. Petitioner refers to the "Fighting Words Doctrine" and his right to free speech throughout his Petition. However, Petitioner twice asserts that his constitutional right to equal protection of the laws was violated. *See Petition* at 9 & 28. Although the distinction is irrelevant to the discussion that follows, Deputy Johnson will assume that Petitioner's claim is based on the free speech clause of the First Amendment.

Federal claim pursuant to clearly established Texas law that he now asserts before the Court.

Petitioner's pleading only raised Texas common law causes of action: false arrest, false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress. *CR 3*. Nowhere in his pleading does he allege that his Federal rights were infringed by any defendant. A pleading in a Texas trial court must contain "a statement in plain and concise language on the plaintiff's cause of action." TEX. R. CIV. P. 45(b). Moreover, the pleading "shall contain a short statement of the cause of action sufficient to give fair notice of the claim involved." TEX. R. CIV. P. 47(a). Texas courts hold that the failure to include a cause of action in a pleading precludes recovery on that ground. *See Jay Fikes & Assoc. v. Walton*, 578 S.W.2d 885, 889 (Tex. Civ. App. – Amarillo 1979, writ ref'd n.r.e.); *B.L. Nelson & Assoc. v. City of Argyle*, 535 S.W.2d 906, 910-11 (Tex. Civ. App. – Fort Worth 1976, writ ref'd n.r.e.).

In addition, it was noted above that Petitioner failed to raise in the Texas appellate courts as error the trial court's apparent disregard of Petitioner's alleged Federal claim. Instead, Petitioner merely argued that Deputy Johnson was an agent of CompUSA when he allegedly performed the tortious acts complained of by Petitioner and in doing so he alleged that his words to Deputy Johnson were not "fighting words." In order to preserve error in a Texas trial court, one must comply with the following:

> As a prerequisite to presenting a complaint for appellate review, the record must show that:

> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> > (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
> >
> > (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Appellate Procedure; and
>
> (2) the trial court:
>
> > (A) ruled on the request, objection, or motion, either expressly or implicitly; or
> >
> > (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1(a). In *Metts v. State*, 22 S.W.3d 544 (Tex. App. – Fort Worth, 2000, no pet.), the appellant complained on appeal for the first time that the admission of certain evidence during his criminal trial violated his rights to due process. The court refused to consider this assignment of error holding, "Because appellant did not voice his due process objection at trial, he has waived his right to complain on that basis on appeal." *Metts*, 22 S.W.3d at 549. Petitioner similarly failed to raise any Federal claim, defense or objection in the trial court and thus waived his right to review on that issue.

Texas courts expressly hold that constitutional issues not properly preserved are waived and will not be considered on appeal. *See Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993); *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807, 813 (1959); *In re K.C.M.*, 4 S.W.3d 392, 394 (Tex. App. – Houston [1st Dist.] 1999, pet. denied); *Matter of W.A.B.*, 979 S.W.2d 804, 808 (Tex. App. – Houston [14th Dist.] 1998, pet. denied).

Finally, Texas courts require that briefs on appeal "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(h) (rule applicable in intermediate courts); *see also* TEX. R. APP. P. 53.2(i) (same for petitions for review in the Texas Supreme Court); TEX. R. APP. P. 55.2(i) (same for petitioner's brief on the merits in Texas Supreme Court). Texas courts strictly enforce these briefing requirements. In *Tacon Mech. Contr's, Inc. v. Grant Sheet Metal, Inc.*, 889 S.W.2d 666 (Tex. App. – Houston [14th Dist.] 1994, writ denied), the appellant raised three points of error each complaining of the legal and factual sufficiency of the evidence. The court held that the appellant's briefing omissions resulted in waiver of those points:

> Under these points, Tacon provides no citations to the record and cites no authority. The argument presented is conclusory. Where, an appellant's points of error are not supported by authorities, citation to the record, and contain mere conclusory argument, those points are waived.

Tacon at 671. *Accord Burns v. State*, 923 S.W.2d 233, 237 (Tex. App. – Houston [14th Dist.] 1996, pet. ref'd) (conclusory point with no supporting authority presents nothing for review); *Rauscher Pierce Refsnes, Inc. v. Great*

S.W. Sav., 923 S.W.2d 112, 116-117 (Tex. App. – Houston [14th Dist.] 1996, no writ) (general argument without authority "not in minimal compliance" and therefore waived).

Recently, the Court reaffirmed that it would not review a state court judgment unless a petitioner's federal claim "was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). As in *Adams*, it is clear that the Texas courts never addressed Petitioner's newly asserted Federal claim. *Id.* It is the Petitioner's burden to show the claim was properly presented:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party beats the burden of defeating this assumption by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here."

Id. at 86-87 (citations omitted). Similarly, Petitioner has not satisfied and cannot satisfy his burden to show the claim was properly presented to the Texas appellate courts. The Court also held that the discussion of a federal case "in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim" and that the claim was therefore not presented "with 'fair precision and in due time.' " *Id.* at 88. Petitioner's attempts to do the same thing are equally unavailing.

In *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), the petitioners cited a Federal case

relating to selective enforcement while arguing about the construction of a state statute. *Id.* at 550 n.9. This Court refused to address the claim and held, "This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction under 28 U.S.C. § 1257(2)." *Id.* In the case at bar, Petitioner cited two Federal cases and declared that he did not use "fighting words" while arguing that CompUSA could be held liable under a respondeat superior theory for state law tort claims. Petitioner did not adequately inform the Texas courts that he was asserting a Federal claim. *Accord Webb v. Webb*, 451 U.S. 493, 495-502 (1981) (Federal full faith and credit argument not properly raised in state court and state court did not pass on issue so Court was without jurisdiction to review claim); *Beck v. Washington*, 369 U.S. 541, 549-554 (1962) (state supreme court only addressed interpretation of state statute and Federal equal protection claim was not properly raised or briefed, so Court refused to address equal protection claim).

This Court should deny the Petition for Writ of Certiorari because Petitioner never pleaded or raised a Federal claim in the lower proceedings, and assuming *arguendo* that he did, he failed to properly argue and preserve the issue for this Court's review.

B. The Court Should Deny the Petition Because Petitioner's Claims Were Determined on Adequate and Independent State Grounds

Throughout the course of proceedings in this case, the only issue asserted by Deputy Johnson and the only issue addressed by the Texas courts with regard to Deputy Johnson was whether Deputy Johnson was entitled to official immunity. A synopsis of the official immunity defense is worth considering.

Government officials in Texas are entitled to official immunity from suit arising from discretionary acts within the scope of their authority when performed in good faith. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). A discretionary act is one which "involves personal deliberation, decision and judgment." *City of Lancaster*, 883 S.W.2d at 654. Petitioner conceded below that Deputy Johnson's acts were discretionary under Texas law. *See Appellant's Brief* at 6.

A government official in Texas acts in the scope of her authority "if she is discharging the duties generally assigned to her." *Chambers*, 883 S.W.2d at 658. Whether an officer performs illegal acts or acts negligently is not determinative of whether the officer is performing within the scope of her authority. *Id.* Under Texas law, a peace officer is on-duty once she witnesses what she believes was criminal activity and must react accordingly. *See* Tex. Code Crim. Proc. Ann. art. 2.13 (Vernon 1977); Tex. Code Crim. Proc. Ann. art. 14.01(b) (Vernon 1997). Texas courts have interpreted these statutes as so requiring. *See Hafdahl v. State*, 805 S.W.2d 396, 401 (Tex. Crim. App. 1990) (en banc) ("when the police officer stopped at the scene

of the accident and approached appellant shouting 'halt, halt, stop, police,' the officer was no longer off duty"); *Selvage v. State*, 680 S.W.2d 17, 21 (Tex. Crim. App. 1984) (en banc) (uniformed officer in jewelry store on personal business was "in lawful discharge of official duty" when he began to investigate suspicious customer who subsequently shot officer dead and robbed store); *Villegas v. Griffin Indus.*, 975 S.W.2d 745, 754 (Tex. App. – Corpus Christi 1998, pet. denied) (off-duty officers doing investigative work for a private company were held to be on-duty peace officers who could arrest the suspects without a warrant, and hence acted under authority of law, because the officers "reasonably believed a crime had been committed"). The Court of Appeals properly held under Texas law that Deputy Johnson was acting in the scope of his authority. *Larkin*, 44 S.W.3d at 189 & 190 (see also *Petition* at Appendix 2-4).

Generally stated, the good faith element of the official immunity inquiry asks whether a reasonably prudent officer could have believed that the same action taken was justified under the same or similar circumstances known to the officer at the time. *Chambers*, 883 S.W.2d at 656. The burdens of the summary judgment movant and nonmovant were described by the Texas Supreme Court as follows:

> *The "could have believed" aspect of the good faith test means that in order to be entitled to summary judgment, an officer must prove that a reasonably prudent officer might have believed that the pursuit should have been continued.* It does not mean that an officer has to prove that it would have been unreasonable to stop the pursuit; nor must the officer prove that all reasonably prudent officers

> would have continued the pursuit. *To controvert the officer's summary judgment proof on good faith,* the plaintiff must do more than show that a reasonably prudent officer could have decided to stop the pursuit; *the plaintiff must show that "no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts."*

Chambers at 656-57 (citations omitted) (emphasis added). In sum, the *Chambers* good faith test asks whether a reasonably prudent officer could have continued the action complained of considering the need to continue the action and considering the risks to the public in continuing the action, and under the same facts and circumstances. To rebut a showing of good faith, the plaintiff must come forward with evidence that "no reasonable person" could have thought the defendant's acts were justified under the facts and circumstances. The *Chambers* good faith test is not a general negligence test that asks "what a reasonable person would have done," but instead it asks "what a reasonable officer could have believed." *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 n.1 (Tex. 1997); *see Chambers* at 656 n.5. The *Chambers* need/risk assessment "is based on the officer's perception of the facts at the time of the event." *Bridges v. Robinson*, 20 S.W.3d 104, 111 (Tex. App. – Houston [14th Dist.] 2000, no pet.). "Evidence of negligence alone will not controvert competent evidence of good faith." *Wadewitz* at 467 n.1. An employee who is alleged to have committed an intentional tort may still have acted in good faith and may still be entitled to official immunity. *Davis v. Klevenhagen*, 971 S.W.2d 111, 113-14 & n.4 (Tex. App. – Houston [14th Dist.] 1998, no pet.) (citing cases).

"[I]n general, summary judgment is proper and immunity should be recognized on the good faith issue if officers of reasonable competence could disagree on the issue." *Geick v. Zigler*, 978 S.W.2d 261, 265 (Tex. App. – Houston [14th Dist.] 1998, no pet.). Based on Deputy Johnson's uncontroverted summary judgment evidence, the Court of Appeals held that Deputy Johnson acted in good faith under Texas law and it expressly stated that it would not address the merits of Petitioner's Texas claims because official immunity precluded such review. *Larkin*, 44 S.W.3d at 190 (see also *Petition* at Appendix 4).

This Court does not exercise jurisdiction over claims that were resolved in state courts on "adequate and independent" state grounds, regardless of whether those grounds are substantive or procedural. The Court has stated:

> This Court has long held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. Although this doctrine originated in the context of state-court judgments for which the alternative state and federal grounds were both "substantive" in nature, the doctrine "has been applied routinely to state decisions forfeiting federal claims for violation of state procedural rules."

Harris v. Reed, 489 U.S. 255, 260-61 (1989) (citations omitted) (holding that "plain statement" rule applied to habeas corpus proceedings).

As discussed above, Petitioner clearly did not raise or preserve his Federal claim before the Texas courts.

Among other procedural rules cited above which would bar review of Petitioner's Federal claim, the Texas Supreme Court has made it clear that constitutional questions not raised in the trial court are waived and will not be addressed by the court. *Dreyer*, 871 S.W.2d at 698. Its insistence on raising the claim in the trial court has been applied consistently and serves a legitimate state purpose. *See Wainwright v. Sykes*, 433 U.S. 72, 86-90 (1977) (contemporaneous objection rule served legitimate state interests of judicial comity, the creation of a complete and comprehensive record, allows a judge to make proper factual determinations, may lead to finality in litigation and prevents sandbagging; therefore waiver of state procedural grounds was adequate and independent state ground for decision); *Stembridge v. State of Georgia*, 343 U.S. 541, 547-548 (1952) (it was clear to the Court that the Georgia Supreme Court took no action on Federal constitutional claim because it was not raised in the trial court and was not sufficiently briefed under Georgia procedure; "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment.").

Finally, in *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), an employee subject to dismissal only for "just cause" was terminated for lying on her application and for being a member of the Communist Party. *Black* at 293-94. After the California Supreme Court overturned an earlier reinstatement order, she petitioned for a writ of certiorari asserting that the court's decision violated her equal protection and due process rights. *Id.* at 295. The

Court found that the California court did not resolve the issue on Federal grounds:

> As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented. Moreover, even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question.

Id. at 299. The Court dismissed the writ. *Id.* at 300. In the case at bar, it is clear beyond dispute that the Texas courts addressed a Texas defense applicable only to Texas tort claims; it did not address any Federal questions nor was it required to do so. For this reason alone, the Court should decline to take jurisdiction over this petition as the Texas courts' ground for dismissing Petitioner's state law claims were independent and adequate under this Court's jurisprudence.

PRAYER

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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